
(1947) 04 MAD CK 0014
In the Madras High Court

Koru Issaku and Others

APPELLANT

Vs

Gottumukkala Seetharamaraju and Others

RESPONDENT

Date of Decision : 15-04-1947

Acts Referred:

Transfer of Property Act, 1882 — Section 73

Citation : AIR 1948 Mad 1 : (1948) ILR (Mad) 454 : (1947) 60 LW 480 : (1947) 2 MLJ 166

Hon'ble Judges : Frrederice William Gentle, C.J;Rajarnannar, J;Horwill, J

Bench : Full Bench

Judgement

Rajarnannar, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Narasapur confirming the decree and

the judgment of the learned District Munsiff of Bhimavaram in a suit instituted by the first respondent. The first and second defendants are the sons

of One Swami by his first wife ; the third defendant is the son by his second wife. At all material times defendants 1 and 2 were undivided, but the

third defendant was divided from them. By a sale deed dated 22nd November, 1929, (Ex. P-1) the first and second defendants sold to the plaintiff

for Rs. 6,000, the lands in two survey numbers of the extent of 8 acres 44 cents in R.S. No. 815 and one acre 34 cents in R.S. No. 817/1, in the

village of Srungavruksham in West Godavari district. On the date of sale R.S. No. 817/1 was subject to a mortgage dated 1st December, 1924

executed by the first defendant in favour of one Bhaskara Rao. On the same date as Ex. P-1, i.e., 22nd November, 1929, defendants 1 and 3

purchased R.S. No. 683/1 in the same village which was 4 acres 8 cents in extent. It is not disputed that the interest which the first defendant

acquired under this purchase was for the benefit of himself and his undivided

brother, the second defendant. To indemnify the plaintiff against any loss that he may sustain on account of the mortgage subsisting on one of the items sold to him, viz., R.S. No. 817/1, defendants 1 and 2 gave as security a defined plot of two acres on the eastern side of R.S. No. 683/1, which, as already mentioned, was of a total extent of 4 acres 8 cents. It has been found by both the Courts below that on the date of these transactions, i.e., 22nd November, 1929, there was no division" by metes and bounds of the said R.S. No. 683/1 between defendants 1 and 2 on the one hand and the third defendant on the other. It was sometime after January, 1930 that there was a partition according to which the western half of the survey number fell to the share of defendants 1 and 2 and the eastern half to the share of the third defendant. It was suggested by the plaintiff that this partition was fraudulent, but his plea was not substantiated.

2. On the 1st January, 1930, defendants 1 to 3 executed a mortgage over R.S. No. 683/1 in favour of one Narasaraju. In the deed of mortgage (Ex. D-2) it is recited that a half share in the property belonged to the first and second defendants and the other half share belonged to the third defendant. On the 4th November, 1930, the first and second defendant sold the western half of the survey number which had fallen to their share, to the father of defendants 6 to 8 after obtaining a release from the mortgagee under Ex. D-2 in respect of that half. On the 25th July, 1934, the third defendant sold the eastern half of the survey number which fell to his share to defendants 4 and 5. Defendants 1 and 2 did not discharge the mortgage in favour of Bhaskara Rao on R.S. No. 817/1 and in execution of a decree obtained by the mortgagee the plaintiff lost the property covered by that survey number. Thereupon he instituted the suit out of which the present second appeal arises, to recover the amount of loss sustained by him by a sale of the property given as security in his sale deed. In his plaint he referred to the partition between defendants 1, 2 and 3 at which the western half of R.S. No. 683/1 fell to the share of defendants 1 and 2. He attacked the partition as fraudulent, but in the alternative he alleged that assuming that the partition was valid, even then the half share of two acres 4 cents on the west alleged to have fallen to the share of defendants 1 and 2, is, both according to law and

equity, liable as substituted security with respect to the plaintiff's loss.

The main contesting defendants were defendants 6 to 8, their father who was the purchaser under Ex. D-5 having died. Inter alia they pleaded that

their father had no notice of the hypothecation in favour of the plaintiff and that he was a bona fide purchaser for proper consideration and that the

plaintiff was not entitled to proceed against their property and the plaintiff could not rely on any rule of substituted security. The learned District

Munsiff held that the plaintiff was entitled to recover a sum of Rs. 969, being the amount of loss sustained by him with subsequent interest by the

sale of the western half share in R.S; No. 683/1 in the hands of defendants 6 to 8 and granted a decree accordingly. This decree as already

mentioned was confirmed on appeal by the learned Subordinate Judge. Hence this second appeal by defendants 6 to 8.

3. On the findings of the lower Court which must be accepted as final in second appeal, the position is as follows:

4. On the date of the sale deed in favour of the plaintiff which contained a covenant of indemnity and created the hypothecation in his favour,

defendants 1 and 2 were not entitled to any Specific plot of 2 acres in R.S. No. 683/1 on its eastern side. They were entitled at the time only to an

undivided half share in that survey number. At the partition the eastern half fell to the share of the third defendant from whom defendants 4 and 5

derive title. Undoubtedly this land, viz., the eastern half now in the hands of defendants 4 and 5 cannot be liable to any charge in favour of the

plaintiff or the burden of the indemnity in his favour. The ruling of the Judicial Committee, *Mohamed Afzal Khan v. Abdul Rahman* (1932) 63

M.L.J. 664 : L.R. 59 IndAp 405: ILR 13 Lah. 702 (P.C.) is conclusive on the point. The entire controversy therefore in the lower Courts was as

to whether the western half which fell to the share of defendants 1 and 2 at the partition and which was conveyed subsequently to defendants 6 to

8 was liable, though it was not the subject, of the security given under the sale deed Ex. P-1.

5. This second appeal originally came for hearing before Happell, J., who thought that the question arising in the-case should be considered by a

Division Bench. The appeal then was heard by Wadsworth and Govindarajachari, JJ., who thought it desirable that the case should be posted

before a Full Bench.

6. The question which calls for decision in this appeal may be shortly stated thus:

When one of several co-sharers purports to mortgage a specific item of property to which they are jointly entitled and after the execution of the

mortgage there is a partition among the co-sharers at which the item mortgaged is not allotted to the mortgagor-co-sharer, but other items are

allotted to him, what are the rights of the mortgagee? This question must be considered from two aspects, viz., (i) what are the rights of the

mortgagee against his mortgagor ? (ii) what are his rights against an alienee of the items allotted to his mortgagor at the partition ?

7. It has now been well established that when one of two or more co-sharers mortgages his undivided share in the properties held jointly by them,

the mortgagee takes the security subject to the right of the other co-sharers to enforce a, partition and if the mortgage is followed by a partition and

the mortgaged properties are allotted to the other co-sharers they take those properties in the absence of fraud, free from the mortgage and the,

mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This rule is sometimes described

as the rule of substituted security and so far as Courts in India are concerned it is traced to the decision of the Judicial Committee in (1874) L.R. 1

I.A. 106 (Privy Council)

8. This rule has also been applied without hesitation to a case where the co-sharer mortgages his undivided share in some only of the properties

held by him jointly with the other co-sharers, though no doubt it was realised that there might be difficulty in determining which of the lands allotted

to the mortgagor at the partition should be taken to represent the mortgaged properties where the mortgage does not cover the entire undivided

share of the mortgagor but only comprises some of such properties. Asutosh Mukerjee, J., worked out in *Hakimlal v. Rarnlal* (1907) Cri.L.J. 46 a

formula for such instances, viz., the substituted security must be a fraction of the share allotted to the mortgagor bearing the same proportion to the

share as the mortgaged property would bear to the entire joint property. There have been several decisions extending the doctrine of substituted

security to such cases, i.e., where the mortgage is only of an undivided share in some of the joint properties and the pronouncement of the Judicial

Committee in Mohamed Afzhal Khan v. Abdul Rahman (1932) 63 M.L.J. 664 : L.R. 59 IndAp 405 : ILR 13 Lah. 702 (P.C.) covers them.. It

may be mentioned that the leading case of (1874) L.R. 1 I.A. 106 (Privy Council) was itself a case where the mortgage comprised the undivided

share of the mortgagor only in two villages though he was jointly entitled to other properties also. It was not seriously contended before us that the

doctrine of substituted security should, not be extended to such cases.

9. It was strongly urged by Mr. P. Satyanarayana Rao, learned advocate for the appellants that this doctrine cannot be extended to a case where

a co-sharer purports to mortgage a specific item out of joint property. He relied in support of his contention on the judgment of Varadachariar, J.,

in Ramanna Chettiar v. Manickam Chettiar 1935 M.W.N. 788 in which the learned Judge said:

Where no reference at all is made to the fact of the mortgagor being the owner of a share and the property is mortgaged as if he was the absolute

owner thereof, it seems to me there is even less justification for the application of the doctrine of substituted security and there are obvious

difficulties as pointed out by me in extending this doctrine very far.

10. He also relied on certain observations in the order of reference indicating that the learned Judges who made the reference were inclined to

accept the view of Varadachariar, J. The learned advocate for the appellants has not been able to place before us any other decision taking the

same view. On the other hand there are decisions which appear to justify an extension of the doctrine even to cases where the co-sharer

mortgages one item of the joint property and not merely an undivided share of the item or an undivided share of the entire joint property. In

Prahhala Pullamma Vs. Garlapati Bradosham and Others, the mortgage was of a specific extent of 7 acres 76 cents out of the joint property

belonging to the mortgagor and other co-sharers. According to a partition made subsequently as a result of arbitration the lands in question, viz.,

7.76 acres were allotted to a sharer other than the mortgagor and he sold them to the plaintiff. It was held that the plaintiff was entitled to a

declaration that the lands purchased by him were not affected by the mortgage and proceedings taken on the foot of mortgage. The learned Judges

in discussing the law say as follows:

At the time the fifth defendant mortgaged 7.76 acres in question he had no specific or exclusive right to them. He then possessed but an undivided interest in the whole of the lands granted to him and others jointly including those in dispute and the mortgage made by him was clearly subject to the conditions and liabilities which at the date of the transaction affected his undivided interest in the property mortgaged.

In the view of the learned Judges the rule of substituted security enunciated in Domat's Civil Law and by the Privy Council in (1874) L.R. 1 I.A.

106 (Privy Council) case applied to the facts. It must, however, be said that the contest in that case was between the mortgagee and a purchaser from the co-sharer other than the mortgagor. The question now in issue did not directly arise.

11. The same may be said of Muthia Raja Vs. Appala Raja minor by his next Friend, Mangammal and Another, . But the statement of the law by

the learned Judges taken in conjunction with the facts in that case appears to me to indicate that the doctrine of substituted security was applicable

to the case in their opinion. As pointed out in the order of reference the mortgage in that case was over certain specific items of family property

executed by the first defendant, one of the co-sharers. At a subsequent partition these items fell to the share of another co-sharer. It was held that

the mortgage was not binding on such items. This is what the learned Judges say:

The mortgage by the first defendant was before the partition. At the partition the whole of the suit properties fell to the plaintiff's share. It is not

alleged that the partition was otherwise than fair and equal. It was not in fraud of the mortgagee. The authorities are clear that a mortgagee of an

undivided share in common property, or of one of the joint properties before partition from one of the sharers is only entitled to proceed against

the substituted property which falls to the share of the mortgagor at the partition, unless the partition has been unfair or is in fraud of the mortgagee.

The principle is well explained in Domat's Civil Law, Section 1671. In (1874) L.R. 1 I.A. 106 (Privy Council) the Privy Council has adopted the

same principle.... But the broad principle above referred to has been applied in numerous cases.

Varadachariar, J., thought that this statement did not justify him in extending the doctrine of substituted security to the case of a mortgage of an item

of joint property, because the point did not arise for decision in that case and the learned Judges merely purported to restate the effect of the authorities. With great respect to the learned Judge, I do not think so. Having regard to the facts of the case, viz., that it was concerned with a mortgage of one of the joint properties and not an undivided share in any property, the learned Judges deliberately added the words "" or of one of the joint properties."" These or similar words do not occur in Domat's Civil Law or (1874) L.R. 1 I.A. 106 (Privy Council) The addition of these words clearly implies that in the opinion of the learned Judges, the doctrine enunciated in (1874) L.R. 1 I.A. 106 (Privy Council) would apply to the facts before them. Though it is true that what was directly decided in that case was that the mortgagee was not entitled to proceed against the properties mortgaged which had been allotted to a co-sharer other than the mortgagor, nevertheless the decision is really based on the rule that the mortgagee is entitled to proceed only against the substituted property which falls to the share of the mortgagor at the partition. The other part of the rule, viz., that he was not entitled to proceed against the property originally mortgaged; was only a corollary to the first part of the rule above stated.

12. Mention is made with approval both in Prahhala Pullamma Vs. Garlapati Bradosham and Others, and Muthia Raja Vs. Appala Raja minor by his next Friend, Mangammal and Another, of the ruling of the Calcutta High Court in Hem Chunder Ghose v. Thako Moni Deb I.L.R.(1893) Cal.

533 and the significance of the approval of this decision would become apparent when we examine the facts of that case. One Ramgovind executed a mortgage in favour of the plaintiff of a certain plot of land within specified boundaries. It was found that the land was the joint property of the mortgagor and other co-sharers. Subsequent to the execution of the mortgage there was a partition under a decree of Court by which the mortgaged property with the exception of a small portion which was kept joint was allotted to the sharers other than the mortgagor. The mortgagee brought a suit to recover the principal and interest due on the mortgage. The defendants included not only the representatives of the mortgagor, the original mortgagor having died, but also the co-sharers to whom the major portion of the mortgaged land had been allotted at the partition. The

partition was not challenged on the ground of fraud. The lower Courts held that the mortgagee was not affected by the partition and that the

mortgaged property with the exception of the non-mortgagor's shares should be sold in satisfaction of the mortgage just as if no partition had been

made. The co-sharers appealed to the High Court. The learned Judges, Macpherson and Beverley, JJ., dealt with the facts thus:

What was mortgaged was joint undivided property in which the appellants had a 3 anna odd-gunda share ; their co-sharers, the mortgagors, could

undoubtedly pledge their own undivided shares--at least it is no part of the appellants' case that they could not do so, but they could not by such

mortgage affect the interest of the other co-sharers. The mortgage was subject to the right of those sharers to enforce a partition.... In the absence,

therefore, of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which on

partition was allotted to the appellants, but he can proceed against that portion of the undivided property which was allotted to the mortgagor

defendants in substitution of their undivided share in the portion mortgaged. We must set aside the decrees of the lower Courts directing the sale of

the mortgaged property, with the exception of the 3 anna oddgunda share belonging to the appellants, and remand the case in order that it may be

determined exactly what portion of the mortgaged property was on partition allotted to the appellants. Against that portion the plaintiff* can have

no charge. They will of course be at liberty to bring to sale the share of the mortgagor defendants in the portion which was left undivided, as well as

any property which has been allotted to the latter in substitution of what was mortgaged, and this is a point which the Court will also have to

determine, if it can do so.

This decision is clearly an authority for the position that even when a co-sharer mortgages a definite plot out of the joint property and there is a

subsequent partition in which that plot is not allotted to the mortgagor, but other property is, the mortgagee has a right to proceed against the

property allotted to his mortgagor. I do not agree with the remark of Varadachariar, J., in *Ramanna Chettiar v. Manickam Chettiar* (1935)

M.W.N. 788 that it is not possible to gather from the report whether the mortgage in that case was of a specific property or an undivided share. It

is clear from the report that the mortgaged property was of an extent of 2 bighas of ryoti land within specified boundaries.

13. This view has been uniformly taken by other Courts. It is sufficient to mention the decisions in *Liladhar Uttamchand v. Shivaji Ganesh* AIR

1936 Nag. 125 *Mohan Lal v. Wadhawa Singh* AIR 1934 Lah. 660 and *Ganga Prasad Sao and Others Vs. Dulari Saran Singh and Others*, . I do

not see anything to prevent the equitable rule enunciated by the Judicial Committee in (1874) L.R. 1 I.A. 106 (Privy Council) from being applied to

the case of a mortgage of a specific item of joint property by one co-sharer.

14. *Varadachariar, J.*, was apparently inclined not to extend the rule to such cases because of the

hardships of unlimited extension of the rule when we come to deal with the rights of the bona fide alienees of the properties allotted at the partition

to the mortgagor.

He adverted to the fact that such a transferee cannot ordinarily discover that the property he is purchasing is subject to any encumbrance by a

search of the registration records. But with great respect I am unable to see how these considerations can apply to the mortgagor himself Or his

legal representatives. On the other hand it appears to be inequitable that it should be open to the mortgagor to hold the substituted lands free of the

burden of the mortgage which he had purported to create on a part of the joint property, though he might not legally have been competent to

alienate that part In my opinion the consideration of the hardship to a bona fide purchaser is not relevant in determining the rights inter se between

the mortgagee and the mortgagor. With great respect, I do not think it would be correct to say that, when a co-sharer purports to alienate a

specific item of joint property, he is dealing with property to which he had no title at the time. He certainly had some title, viz., the interest of an

undivided co-sharer. The learned Judge refers to the analogy of an alienation by a member of a joint family of an item of joint family property, but

we find that the law applicable to such cases is also the same. In *Mayne's Hindu Law* (tenth edition, page 498), the law is stated as follows:

A coparcener may alienate either his undivided share in the whole of the family property or his undivided share in certain specific family property,

or the whole of a specific item of the family property. In all these cases, the

alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession, but only an equity to stand in his vendor's shoes and to work out his right by means of a partition.... In dividing the family properties the Court will no doubt set apart for the alienating coparcener's share the property alienated if that can be done without any injustice to the other coparceners, and such property if it is so set apart, may be given to the transferee of the interest of such coparcener.... If such property is not so set apart, then the alienee would be entitled to recover that property which was allotted to his vendor for his share, in substitution for the property that I was alienated in his favour.

It is now necessary to discuss the rights of the mortgagee of a specific item of joint property from a co-sharer against the alienee of the property allotted to the mortgagor towards his share. For a proper determination of this part it is necessary to ascertain the nature of the right of the mortgagee. Obviously it is not a right provided by any statute such as the right declared in Section 73 of the Transfer of Property Act under which the mortgagee is entitled to claim payment of the mortgage money out of the sale proceeds where the mortgaged property is sold owing to failure to pay arrears of revenue or other public charges or the mortgaged property is acquired under the Land Acquisition Act. It is also clear that the right which the mortgagee obtains to realise the amount due to him from and out of the properties allotted to his mortgagor at a partition is not in the nature of a mortgage. According to the definition in Section 58 of the Transfer of Property Act, a mortgage must "be a transfer of an interest in specific Immovable property. The mortgagee's right certainly cannot satisfy this definition. At the same time I do not think the mortgagee's right is merely a personal right or personal equity (see *Ramasami Iyer v. Bhagavathi Muthu Pillai* (1935) 70 M.L.J. 506). In my opinion it would be a right to a security though it may not amount to a mortgage and would come within the definition of a "charge" in Section 100 of the Transfer of Property Act, viz., where the Immovable property of one person is by act of parties or by operation of law made security for payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. The charge which a co-sharer who

pays the arrears of rent acquires on the other co-sharers' portions of the joint holding, the charge which arises in favour of a person, entitled to

contribution u/s 82 of the Transfer of Property Act, the vendor's charge for unpaid purchase money and the vendee's charge over the prepaid

purchase money are instances of charges based on rules of law and equity. This view is in accordance with the pronouncement of the Judicial

Committee in (1874) L.R. 1 I.A. 106 (Privy Council) The Right Honourable Sir Montague E. Smith delivering the judgment of the Judicial

Committee said:

Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that

the mortgagee of the undivided share of one co-sharer... who has no privity of contract with the other co-sharers would have no recourse against

the lands allotted to such co-sharers ; but must pursue his remedy against the lands allotted to his mortgagor/and as against him would have a

charge on the whole of such lands.

It would then follow that a bona fide transferee for value without notice would be protected against such a charge. The second part of Section 100

which was inserted by the Transfer of Property Amendment Act of 1929 only declared what was always considered to be the law. It says:

Save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a

person to whom such property has been -transferred for consideration and without notice of the charge.

On this point it is not necessary to refer to any decision other than the leading case of (1874) L.R. 1 I.A. 106 (Privy Council) In that case certain

portions of the property allotted at the partition was in the possession of persons who had purchased them at Court sales. It was argued before the

Privy Council that the purchases by these respondents were made bona fide in open market and therefore their lands could not be proceeded

against by the mortgagee. Dealing with this part of the case their Lordships say as follows:

The only remaining question is, whether the respondents, other than the representatives of the mortgagor are in a better position than he would

have been. They were all mere purchasers at execution sales of his right, title

and interest.... and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the appellant's title is not very material ; but if it were, there is no doubt that they were made with such notice. This passage to my mind clearly indicates that the charge which the mortgagee acquires cannot be enforced against transferees without notice other than of course purchasers at Court auction who cannot claim the benefit of the doctrine of purchase for value without notice. The same result is reached if the right of the mortgagee is considered to be an equitable right. The Courts of equity have always guarded against a merely equitable right being enforced against a bona fide purchaser for value without notice of such right. I agree with the observations of Varadachariar, J. in *Ramanna Chettiar v. Manickam Chettiar* (1935) M.W.N. 788 on this point and in my opinion the actual decision of the learned Judge in that case can be justified by the concurrent findings of the lower Courts which he accepted that the alienees were bona fide purchasers without notice, though as I have already said I do not agree with him in his view that the doctrine of substituted security can never apply to the case of a mortgage by a co-sharer of a specific item of joint property.

15. In the present case I am clearly of opinion that the father of the appellants must be deemed not to have had notice of the charge in favour of the plaintiff. The learned Subordinate Judge says that if an enquiry had been made he would have become aware of all the circumstances. I fail to see how any reasonable enquiry and examination of the registration records could have revealed to the purchaser any charge over the western half of the survey number which he was purchasing. This half fell to the share of his vendor at the partition and besides the mortgage under Ex. D-2 in respect of which there was a release, the only other encumbrance which would have been apparent is the existence of the security on two acres on the eastern side, which he was not purchasing. It is not suggested that the purchaser personally knew of all the transactions. In my opinion the appellants would be entitled to the benefit of the protection in favour of a transferee without notice and the property in their hands cannot be proceeded against for the realisation of the amount due to the plaintiff. It may be that the plaintiff is entitled to relief against the mortgagors, but that

aspect was not pressed before us.

16. In the result the second appeal is allowed and the judgments and decrees of the lower Courts set aside in so far as they are against the

appellants. The plaintiff will pay the costs of defendants 6 to 8 in all the Courts.

Frederice William Gentle, C.J.

17. I agree.

Horwill, J.

18. I too agree.